Rule 26.

Depositions Pending Action.

(d) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

* * *

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 42.

Consolidation; Separate Trials.

* * *

(b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim,

or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 46.

Exceptions Unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 49.

Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As

to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

Rule 51.

Instructions to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform

counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

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Supreme Court of the United States

OCTOBER TERM 1961

No. 465

ELIZABETH N. GRAHAM, Individually and doing business as MAINE CHANCE FARM,

Petitioner,

v.

FANNIE K. HERTZ,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ANDREW L. HUGHES
Counsel for Petitioner
220 East 42nd Street
New York 17, New York

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 150—October Term, 1960.

(Argued January 13, 1961 Decided July 3, 1961.)

Docket No. 26349

292 F. 2d 443

FANNIE K. HERTZ,

Plaintiff-Appellee,

—v.—

ELIZABETH N. GRAHAM, individually and doing business as MAINE CHANCE FARM,

Defendant-Appellant.

Before:

CLARK, MAGRUDER and MOORE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, *Judge.*

Defendant appeals from a jury verdict awarding damages for the death of plaintiff's race horse as well as from the court's granting of interest up to the date of the judgment. Judgment for the plaintiff affirmed in part, and in part judgment for the plaintiff vacated and the case remanded to the District Court with directions.

WILLIAM J. MANNING, of Simpson Thacher & Bartlett, New York, N. Y. (Cyrus R. Vance and Rolon W. Reed, of Counsel), *for Plaintiff-Appellee.*

JOHN J. MACCHIA, of Townley, Updike, Carter & Rodgers, New York, N. Y. (J. Howard Carter and Lee W. Meyer, of Counsel), *for Defendant-Appellant.*

MAGRUDER, *Circuit Judge*:

Plaintiff owned a race horse named Speedy Wave. Defendant also owned one named Star of Roses. The two horses collided on the training track at Belmont Park and both were killed instantly. Plaintiff sued Mrs. Graham for the loss of Speedy Wave. Defendant counterclaimed for the loss of Star of Roses. The jury brought in a verdict giving damages to the plaintiff for the death of Speedy Wave. Judgment was entered pursuant to the jury verdict, from which the defendant takes the present appeal. Wesley E. Brite, an exercise boy in the employ of the plaintiff, had, prior to the present litigation, recovered the sum of $80,000 in a separate action for the injuries he received in the accident. *Brite* v. *Graham*, Civil Action No. 97-240.

The testimony of Brite and of Monte D. Parke, who was employed as Mrs. Hertz's trainer, was to the effect that, on the morning of October 17, 1954, Brite, mounted on Speedy Wave, and Parke, mounted on a pony, entered the training track at Belmont Park. Their purpose was to "breeze" their horse, that is, to run it a measured distance in a given time, in this instance ⅜ of a mile in 36 seconds. Upon entering the track Brite and Parke encountered defendant's exercise boy and her foreman by the inside rail holding a horse, later identified as Star of Roses, by means of a shank. Parke

called out to them, "You'd better get that horse off the track before you get run over." Star of Roses was led to the outside rail, and the exercise boy mounted it, though defendant's foreman still held onto the horse. Both Brite and Parke noted that Star of Roses was in this position when Brite started to breeze Speedy Wave in a counter-clockwise direction occupying only the inside rail, as was usual for breezing. The total width of the track was, as stated by both Brite and Parke, 90 to 100 feet. Neither of them related just what happened in the meantime. Parke testified that he saw the riderless Star of Roses running in a clockwise direction along the rail about "four jumps" before the accident. Brite did not see Star of Roses until the two horses were "10 or 15 feet away" from each other, and although he attempted to avoid the accident the horses collided.

The testimony tending to show that defendant had been guilty of negligence came entirely from three depositions which the district court admitted in evidence. These depositions, by George W. Cochrane, Peter G. Griffiths, and Patrick F. O'Neil, had been taken in the action brought by Brite against this same defendant to recover for his injuries. These three men had worked for the defendant at one time or another and their duties had included the training of Star of Roses. Mr. Cochrane, who was an assistant trainer for Mrs. Graham from April to June of 1954, deposed that Star of Roses was a "rogue" or "outlaw" which, unlike other two-year-old horses, had not been "broken" to gallop or breeze, but customarily would "duck to the left or to the right or would wheel completely around and dislodge his rider and run off." Each time Star of Roses was brought to the track without a lead pony, it succeeded in unseating its rider, said Mr. Cochrane. Griffiths, the trainer for five days in 1954, had similar experiences with Star of Roses, as did O'Neil, who from June, 1953, to May,

1954, was foreman and subsequently assistant trainer. O'Neil further observed Star of Roses on October 17, 1954, shortly before the accident in question. The horse went 100 yards down the track, dislodged its rider, then wheeled and ran clockwise along the rail. According to the depositions, Mrs. Graham did not allow those responsible for the training of the race horse to use spurs or whips, nor did she take notice of advice that Star of Roses was overstimulated sexually and should be gelded. Once Mrs. Graham awoke her trainer at midnight in order to fire him for having used a whip on Star of Roses. This trainer was said to be "one of the finest in the country."

We think it clear that there was sufficient circumstantial evidence submitted to the jury to justify a plaintiff's verdict that Mrs. Graham and her employees had been negligent and that this negligence had caused the accident. From the many recitals of unruly behavior, it was only natural to infer that Star of Roses merely repeated on the fateful morning what by then had become habitual with it. We cannot know with certainty the grounds upon which the jury based its finding of negligence, but many were available. Defendant knew the propensities of the beast but she did not prevent its being taken onto the track where other horses were apt to be breezing. Several methods of correcting Star of Roses' erratic behavior had been suggested: the horse could have been gelded; perhaps whipping would have deterred such conduct; a "ring" or "trap" or other device could have been used; a lead pony could have accompanied it onto the track.

Likewise it could not be said as a matter of law that the plaintiff or her employees were guilty of contributory negligence. When Brite started to breeze Speedy Wave, the inside rail was clear and Star of Roses was under restraint. Parke testified that he had no knowledge of the dangerous

propensities of Star of Roses, though he surmised upon entering the track that Star of Roses had been "unruly." We do not forget that if the danger had been seen by Parke he had a duty to use care to avoid it. But we cannot say that this is a case where, on the undisputed facts, contributory negligence would have to be found by a reasonable jury. *Torenes* v. *Park Motor Sales, Inc.*, 7 A. D. 2d 109 (1958), aff'd 7 N. Y. 2d 767 (1959). The verdict for the plaintiff must be affirmed on the merits unless there is some other reason for reversing it.

Defendant urges two grounds for reversal. First, she says that the court below erred in dismissing her counterclaim, alleging that the fatal collision was caused by the plaintiff's negligence, she being free of the same. Second, that the trial judge committed reversible error in admitting into evidence the three depositions referred to above.

As to defendant's counterclaim, we must inquire whether the doctrine of collateral estoppel called for a dismissal; and whether, even if it did, the trial judge committed reversible error in ordering a separate non-jury trial of this issue in the face of an earlier ruling by another judge of the district court refusing to grant a motion by the plaintiff for a summary judgment on the counterclaim based on the same ground. It seems that, after Brite had recovered in his suit against Mrs. Graham, the plaintiff, in the present action moved before Judge Kaufman for summary judgment on the defendant's counterclaim, asserting that the *Brite* action had conclusively established that Brite was not negligent and that the defendant was. Judge Kaufman, however, ruled that the *Brite* jury was given the alternative of basing its judgment on a theory of absolute liability for harboring a "dangerous animal" and that under New York law negligence was not an issue in that action. Since in Judge Kaufman's view *Brite* v. *Graham* had not

determined either defendant's negligence or plaintiff's contributory negligence, it followed that he denied the plaintiff's motion for summary judgment. 158 F. Supp. 201, 168 F. Supp. 755 (S. D. N. Y. 1957, 1958).

When this case came on for trial before Judge Levet, plaintiff moved under Rule 42(b) for a separate trial without a jury on the matters raised by defendant's counterclaim. Judge Levet agreed with Judge Kaufman that under the New York law recovery could be granted for harm caused by a domestic animal having dangerous propensities, without regard to negligence. See *Karlow* v. *Fitzgerald*, 288 F. 2d 411 (C. A. D. C. 1961). But Judge Levet felt that the *Brite* action had been presented, perhaps erroneously, in such a way that the jury necessarily determined that Brite was not, and the defendant was, negligent. So finding, he directed that the motion for dismissal of defendant's counterclaim should be granted, on doctrines of *res judicata*. This appears to be the New York law, which throughout the proceeding the parties have taken to be applicable to this question. *Israel* v. *Wood Dolson Co., Inc.*, 1 N. Y. 2d 116 (1956). See *Good Health Dairy Products Corp. of Rochester* v. *Emery*, 275 N. Y. 14 (1937).

If we thought that Judge Levet was right in his ruling, we could not sensibly upset his decision on the ground that he should have accepted Judge Kaufman's order on the same matter in the motion Judge Kaufman had previously determined. The district court's "law of the case" was not our "law of the case"; and certainly it was not the "law of the case" of the Supreme Court. See *White* v. *Higgins*, 116 F. 2d 312, 317 (1st Cir. 1940). It may be conceded to be unseemly for judges of co-ordinate jurisdictions to "review" one another's decisions, and ordinarily they do not do so. Yet in the past we have refused to reverse a case for the purpose of protecting the judicial sensibilities of the judge who first made a ruling on the matter. See *Dicto-*

graph Products Co., Inc. v. *Sonotone Corp.*, 230 F. 2d 131, 231 F. 2d 867 (2d Cir. 1956), which, we assume, has substantially impaired the apparently stronger statement in *Commercial Union of America, Inc.* v. *Anglo-South American Bank, Ltd.*, 10 F. 2d 937 (2d Cir. 1925)."

We have no doubt that Judge Levet was right in his conclusion that the jury in *Brite* v. *Graham* had determined the negligence issues. See Restatement, Judgments §§ 99, 107; *Good Health Dairy Products Corp. of Rochester* v. *Emery*, *supra*, 275 N. Y. 14. It is true that at one point in the charge of the court in that action reference was made to an absolute liability statement of §509 of the Restatement of Torts. But when the charge is read as a whole, it is evident that the court intended to leave the case to the jury on a negligence theory and that the jury would reasonably so have understood it. The court specifically charged the jury in *Brite* v. *Graham* that:

> "For plaintiff to recover he must establish by a fair preponderance of the evidence four things:
>
> "1. That the horse Star of Roses was a dangerous or vicious horse in the sense that I have defined this term to you, or had dangerous tendencies likely to cause injury to others;
>
> "2. That Mrs. Graham, or her agents or servants, knew or should have known that is was a dangerous or vicious horse or that it had such dangerous tendencies;
>
> "3. That having such knowledge, it was negligence for Mrs. Graham, or her servants or employees, to permit the horse to be or remain on the exercise track on the morning in question; and
>
> "4. That plaintiff is free from contributory negligence."

Furthermore the jury in the present case, in answer to a special interrogatory propounded by the court, found that defendant, Mrs. Graham, had been negligent, which was proof enough that it would have found in favor of the plaintiff on the defendant's counterclaim had that issue been submitted to it.

We find no error also in the way in which the trial judge dealt with the three depositions which defendant complains should not have been introduced into evidence. As has already been stated, these depositions were taken in the case of *Brite* v. *Graham*. In a pre-trial ruling, Judge Dawson had held that testimony and depositions from that action would be admissible even though the parties were different, "provided, however, that plaintiff meets the same requirements necessary for the reading of any deposition (Rule 26(d)(3) of the Rules of Civil Procedure)." 23 F. R. D. 17, 23 (S. D. N. Y. 1958). As a matter of fact, appellant does not question the correctness of Judge Dawson's basic ruling, but challenges only the conclusion by the district judge that the conditions of the proviso had been satisfied.

Rule 26(d)(3) permits the use in evidence of depositions when "the witness is at a greater distance than 100 miles from the place of trial or hearing * * * [or] the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or * * * that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." Plaintiff introduced Cochrane's deposition and read it into evidence without objection from the defendant. Before it was introduced and read to the jury, defendant's counsel had told the court that he had "some motions" which he would like

to address to the court with respect to the "lack of admissibility" of the depositions. But when asked directly whether there was "any objection to reading this deposition of Cochrane," he said he was concerned only with the form of some of the questions and answers. After reading the deposition, he indicated that "there is nothing there that I would object to."

The next day defendant's attorney objected to the introduction of the two other depositions, by Griffiths and O'Neil. These were taken in 1957 and showed on their face that the persons making them resided outside the jurisdiction. Griffiths was living in Long Beach, California; O'Neil's permanent residence was in Chicago, Illinois. When asked when he would be in New York O'Neil answered that he did not know. In colloquy, plaintiff's counsel said that he had inquired and had made "every attempt possible" but had been unable to locate Griffiths and O'Neil. Parke, who was familiar with the habitués of the track, confirmed this. Therefore, Judge Levet's "finding" that Griffiths and O'Neil were "at a greater distance than 100 miles from the place of trial or hearing" is unassailable. There was no evidence from which this court could conclude differently. See *Frederick* v. *Yellow Cab Co. of Philadelphia,* 200 F. 2d 483 (3d Cir. 1952). The court, upon assurance of counsel that he had been unable to locate Griffiths and O'Neil, allowed the two depositions to be read into the record, subject to a motion to strike if the plaintiff failed to verify that the witnesses were not around. At that time no mention was made of Cochrane's desposition. The presentation of the evidence to the jury was completed on that day. When the trial was resumed, plaintiff's counsel said he had found out that Cochrane in fact had been seen at Belmont. This was corroborated by the testimony of Parke. At this juncture defendant moved to have Cochrane's deposition stricken.

but the court ruled that defendant had waived her objection by failing to object in a more timely way. Instructions were then given to the jury by the trial judge and the trial was completed.

The trial court acted within its discretion in letting in the deposition. It is true that Rule 46 F. R. C. P. has obviated the necessity of formal exceptions or rulings, but a timely objection would have given the court an opportunity to make a ruling at a time when the plaintiff could have complied without prolonging the trial. "[D]ue regard to the importance of presenting the testimony of witnesses orally in open court," as stated in Rule 26(d)(3), did not require that Cochrane's deposition be stricken after it had been read into evidence without objection. There is to be sure no suggestion that the testimony in the depositions was unreliable. Defendant's witnesses testified solely as to the amount of damages.

There is, however, one point in the trial judge's action which does call for a reversal, namely, the allowance by the court of interest in the amount of $7,892.10 from the date of the accident which the trial judge added to the jury's verdict of $23,700.00. In taking this action, the trial judge relied upon various cases from New York lower courts, some of which we mentioned in *Newburgh Land & Dock Co.* v. *Texas Co.*, 227 F. 2d 732 (2d Cir. 1955). It is right that the New York law should be controlling in this matter. See *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, 313 U. S. 487 (1941); *Moore-McCormack Lines, Inc.* v. *Amirault*, 202 F. 2d 893, 896 (1st Cir. 1953). The lower New York courts, as indeed did we, *Newburgh Land & Dock Co.* v. *Texas Co.*, *supra*, and various commentators, 60 Harv. L. Rev. 1158 (1947), gathered from a dictum in *Flamm* v. *Noble*, 296 N. Y. 262, 268 (1947), that the New York Court of Appeals regarded

its previous decisions on interest as "manifestly unsound" and would reverse its prior rulings which had allowed interest as a matter of right in actions for conversion, but had left interest in actions for negligence to the determination of the jury. After the hearing on this appeal, the New York Court of Appeals, in *Purcell v. Long Island Daily Press Publishing Co., Inc.*, 9 N. Y. 2d 255 (1961), held that, however unsound this distinction might be, it must stand until changed by the legislature. Although obviously the trial judge could not be blamed for not giving heed to a decision by the Court of Appeals not yet rendered, we feel nevertheless bound to follow the latest published decision by that court, *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538 (1941). The New York law must be presumed to be that interest from the day of the accident is not allowed in this case as a matter of right. If federal law is involved, the exercise of discretion in the award of interest must be made by the jury, not by the court as a matter of law. See *Newburgh Land & Dock Co. v. Texas Co., supra*, 227 F. 2d 732, 735.

It might be that the jury, if it had been permitted to do so, would have allowed interest from the date of the accident as a matter of discretion in order to do more complete justice. The charge given by the court, to which no objection was taken (see Rule 51 F. R. C. P.), said nothing to the jury about interest, nor did the plaintiff mention the item of interest in her requests to charge. Naturally the jury did not exercise any "discretion" in the award of interest, but we do not think that the plaintiff should suffer by reliance upon our earlier interpretations of New York law in being deprived of the chance of a discretionary award of interest by the jury.

The judgment of the District Court is affirmed, so far as it is based upon the earlier verdict of the jury as to the

amount of the plaintiff's loss. Otherwise, the judgment of the District Court is vacated and the case is remanded to that Court for the trial by a jury of the issue of the discretionary award of interest on the amount of the plaintiff's loss, as found by the previous jury, unless the parties waive a jury trial, in which event the trial shall be to the Court, or unless the plaintiff withdraws her claim to interest; plaintiff recovers costs of this appeal.

STATE OF NEW YORK

COURT OF APPEALS

ARTHUR L. PURCELL, as Administrator of the Estate of DELLA PURCELL, Deceased, Respondent, *v.* LONG ISLAND DAILY PRESS PUBLISHING COMPANY, INC., Appellant.

Argued January 19 1961; decided March 2, 1961.
9 N. Y. 2d 255.

Purcell v. *Long Is. Daily Press Pub. Co.*, 11 A. D. 2d 814, modified.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 29, 1960, which affirmed (two of the Justices dissenting as to a part of the judgment) a judgment of the Supreme Court, entered in Kings County upon a verdict rendered at a Trial Term (JOHN E. CONE, J.), in favor of plaintiff.

FROESSEL, J. Plaintiff in this action, upon a jury determination in his favor, recovered damages sustained as the result of a fire in his decedent's building. The trial court, upon motion of counsel after rendition by the jury of their verdict (and absent a prior request that the matter be submitted to the jury), added to the amount awarded interest from the date of the fire, as a matter of right.

Two issues are presented on this appeal: The first relates to the merits, defendant contending that there was no negligence here with which it could be charged, and in that connection challenges the court's failure to charge several requests. The second issue concerns the propriety of the allowance of interest.

On the merits, we find no error here, and have no alternative but to sustain the verdict and its unanimous adoption by the courts below. Our disposition of the second question presented, however, as to the propriety of awarding interest, is otherwise. We are of the opinion that the power to allow interest in this case lay exclusively within the discretion of the jury, and, in consequence, it was error for the court to make such an award as a matter of right.

In *Flamm* v. *Noble* (296 N. Y. 262) we were called upon to decide whether interest was allowable as of right upon a verdict in an action for fraud and duress. Chief Judge LOUGHRAN, holding that it was, reviewed the law pertaining to allowance of interest. Actions in contract, whether for a liquidated or unliquidated amount, were controlled by section 480 of the Civil Practice Act. Interest was there allowable as of right. In tort actions, the following principles then prevailed: "interest is recoverable of right in actions for trespass and conversion, whereas in actions for injuries done to property through negligence the allowance of interest is left to the discretion of the jury. (See *Wilson* v. *City of Troy*, 135 N. Y. 96 * * *)." (296 N. Y., *supra*, p. 268.) The *Wilson* case (135 N. Y. 96) squarely held that the award of interest in a negligence action was for the jury to determine.

In both *Wilson* and *Flamm*, the prevailing distinction between willful and nonwillful torts was criticized. As Chief Judge LOUGHRAN stated in *Flamm* (296 N. Y., *supra*, p. 268), "Such a distinction is manifestly unsound, because interest is essential to complete indemnity in both classes of cases." He was quick to note, however, immediately after the foregoing criticism (*Ibid.*): "But no decision of this court makes the recovery of interest a matter of discretion where, as here, damages are demanded for a money loss caused by fraud and duress. More than that,

Reno v. *Bull* (226 N. Y. 546)—an action for fraud—is authority the other way."

As the matter therefore stood at the time of *Flamm* (*supra*), interest was recoverable as of right in tort actions for conversion, trespass, fraud and duress. In actions involving negligent damage to property, the cases held that the power to make such an award was reposed exclusively in the jury or the trier of the facts (in addition to *Wilson* and *Flamm*, see, e.g., *Walrath* v. *Redfield*, 18 N. Y. 457, 462; *Parrott* v. *Knickerbocker Ice Co.*, 46 N. Y. 361, 369; see, also, *Maris* v. *Manhattan Real Estate Assn.*, 89 N. Y. 498, 507; *Moore* v. *New York Elevated R. R. Co.*, 126 N. Y. 671, 673); and, although we twice characterized this distinction as unsound, we did not declare the law otherwise.

Notwithstanding this criticism, by way of *dictum* in both *Wilson* and *Flamm* (*supra*), of the rule as applied in negligence actions, no corrective action has been taken by the Legislature. Their awareness of the law pertaining to allowance of interest, and inclination to effect a change where, in their judgment, it would serve a salutary purpose, is evidenced by the amendment in 1927 (L. 1927, ch. 623) of section 480 of the Civil Practice Act. That section superseded our decision in *Faber* v. *City of New York* (222 N. Y. 255) which dealt with a nonliquidated contract claim. So, too, the Legislature has provided for interest on awards in wrongful death actions from the date of decedent's death by express provision of section 132 of the Decedent Estate Law.

In our opinion, any change in the rules governing allowance of interest in negligence actions, as here, must similarly await legislative action. The established line of Court of Appeals authority in this area—which, in fact, though criticizing the rule twice, at the same time preserved it—clearly compels this conclusion.

Plaintiff contends that the "courts of this state have consistently followed the rule suggested by this court in *Flamm*". But this is not so. The two Court of Appeals cases cited by plaintiff were decided before *Flamm*, viz., *Sciaky* v. *Rogers & Hagerty* (277 N. Y. 483) and *Weprin & Glass Bldg. Corp.* v. *Rosoff Subway Constr. Co.* (269 N. Y. 672). In the *Weprin* case, however, our decision was based upon defendant's contract with the city, and we held that under such contract its liability was absolute, and was more than a covenant of indemnity; that the case, therefore, fell within the provisions of section 480 of the Civil Practice Act. In *Sciaky*, which appears to have involved a situation similar to that in *Weprin*, we allowed interest from the time of damage, but solely on the authority of the *Weprin* case. The lower court cases cited by plaintiff were clearly and succinctly distinguished in the dissenting opinion below.

In terms of policy consideration, moreover, the implications of a projected change by us in this area of the law are quite serious. Were interest declared to be allowable as of right in this case, we would be constrained to extend the benefits of such rule to plaintiffs in actions for personal injuries—especially where claims for lost wages and medical and hospital expenses (actual out-of-pocket losses and expenditures) are involved. Compulsory addition of interest to such awards to cover periods of six to eight years or more, which it often takes for final judgment to be reached, would serve to inflate these verdicts far beyond their already high levels. If the principle of full indemnity is invoked, such awards should logically bear interest from the occurrence of the act complained of, for negligence is negligence, whether causing injury to person or property. Such drastic changes in the law should be legislatively, and not judicially, effected.

It should be stressed, of course, that by preserving the law in its present posture the principles of justice and fair-

ness are not offended, for those whose property is destroyed or damaged by the negligent conduct of others may still recover interest. The jury, however, must award it to them and, if plaintiff had asked for it here, he might well have received it.

Accordingly, the judgment appealed from should be modified by disallowing any interest upon the verdict of the jury, and in all other respects affirmed, without costs.

FULD, J. (dissenting in part). I would affirm the judgment in its entirety, for I believe, with the courts below, that the plaintiff is entitled to interest as a matter of law.

There can be no doubt that an award of interest is necessary to afford a plaintiff, whose property has been damaged, full indemnity for the wrong done to him by the defendant. And it is equally indisputable that on principle such a plaintiff, whether his property is lost to him through the defendant's willfulness or negligence, is entitled to interest, as part of his damages, as a matter of right. Indeed, Chief Judge LOUGHRAN said precisely this when, on behalf of a unanimous court, he declared just a few years ago in *Flamm* v. *Noble* (296 N. Y. 262, 268): "We come then to the question whether the plaintiff is entitled to interest as matter of law. Under a long-settled New York rule, interest is recoverable of right in actions for trespass and conversion, whereas in actions for injuries done to property through negligence the allowance of interest is left to the discretion of the jury. (See *Wilson* v. *City of Troy*, 135 N. Y. 96, *supra*.) *Such a distinction is manifestly unsound, because interest is essential to complete indemnity in both classes of cases.*" (Emphasis supplied.)

Flamm v. *Noble* dealt with damages occasioned by fraud and duress and, consequently, the court was not called upon to overrule the earlier cases which had created the distinction stamped by the court as "manifestly unsound", but I have no

doubt that the court meant what it said and that, had it been necessary for decision, we would have put an end to the distinction thus forthrightly condemned. The case before us does involve damages for negligent injury to property, and we should now *do* what we *said* in *Flamm*—and what the Appellate Division for both the First and Second Departments understood us to say (*Harmon & Regalia* v. *City of New York*, 286 App. Div. 825 [1st Dept.]; *Johnson* v. *Scholz*, 276 App. Div. 163, 165 [2d Dept.], in addition to case before us, 11 A D 2d 814; see, also, *Sandak* v. *Combs*, 26 Misc. 2d 478 [App.Term, 2d Dept.])—and expressly overrule those earlier cases.

Although the majority acknowledges this court's repeated characterization of the distinction as "unsound", it nevertheless insists that any change in rule "must * * * await legislative action" (opinion, p. 258). With this, I cannot agree. Since the rule was court-created and court-developed, no obstacle exists to prevent the court from modifying it and announcing the doctrine which, following the modern trend (see Note, 60 Harv. L. Rev. 1158), accords with principles of reason and justice. (See *Bing* v. *Thunig*, 2 N Y 2d 656; *Woods* v. *Lancet*, 303 N. Y. 349.)

The rule as originally formulated in this State, as in England, was that interest as part of the damages to property in actions of conversion and trespass could only be had at the discretion of the jury. (*See Beals* v. *Guernsey*, 8 Johns. 446; *Hyde* v. *Stone*, 7 Wend. 354; *Bissell* v. *Hopkins*, 4 Cow. 53; *Rowley* v. *Gibbs*, 14 Johns. 385.) Recognizing that such a rule was illogical because "interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages, is not any more in the discretion of the jury than the value", the courts, without waiting for the Legislature to act, "gradually abandoned" the rule (See *Wilson* v. *City of Troy*, 135

N. Y. 96, 104.) "What seemed to be the demands of justice", wrote the court in the *Wilson* case (135 N. Y., at pp. 103-104), "did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution."

The "demands of justice" now require recognition that in a case of negligent injury to property, no less than in one of intentional injury, complete indemnity must necessarily include interest on the value of the property damaged. And, just as the courts did not require legislative action to justify allowance of interest as of right where the property was willfully converted, so, there is need for them to await such action in order to deal justly in those cases where the property has been negligently damaged. What the court itself has created, it may change and, since this court has on at least two occasions criticized the ancient rule as unsound, we should now abandon it and allow the plaintiff interest on the value of the property damaged through the defendant's carelessness.

Chief Judge DESMOND and Judges DYE, VAN VOORHIS, BURKE and FOSTER concur with Judge FROESSEL; Judge FULD dissents in part in a separate opinion.

Judgment modified in accordance with the opinion herein and, as so modified, affirmed, without costs.